(1)

Supreme Court, U.S.
FILED
JUN 28 1996
OFFICE OF THE CLERK

CASE NO. 96 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOPE C. WUDTKE and KARL F. WUDTKE,

PETITIONERS PRO SE

v.

KELLY CHILDERS, NICKOLAS MURNION, and

SCHOOL DISTRICT #19, GARFIELD COUNTY, MONTANA,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KARL F. WUDTKE, PRO SE

PARTY OF RECORD

N6624 HWY. 47-55

SHAWANO, WISCONSIN 54166

715-524-3281

76 PP

QUESTIONS PRESENTED FOR REVIEW

Question #1: Whether the known "availability" of petitioners for oral depositions, entry having been precluded by respondents, suffices as "appearance"?

Question #2: Whether the Federal Rule of Civil Procedure 41(b) dismissal of the action for petitioners' failure to comply with a single biased discovery order was improper, conflicting directly with this Court's opinion in Chambers v. NASCO, 111 S.Ct. 2123, 2135 n. 14?

Question #3: Whether petitioners were deprived of their right to a trial by jury by material bias of the district and appellate courts, in abject contravention of this Court's holding in Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 956?

PARTIES

Karl F. Wudtke, Petitioner/Plaintiff

Hope C. Wudtke, Petitioner/Plaintiff

Kelly Childers, Respondent/Defendant

Nickolas Murnion, Respondent/Defendant

School District #19 of Garfield

County of Montana, Respondent/Defendant

TABLE OF CONTENTS

THE QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES..... iv

OPINIONS DELIVERED IN THE CASE..... 1

JURISDICTIONAL STATEMENT..... 2

RELEVANT STATUTES..... 3

STATEMENT OF THE CASE..... 4

ARGUMENT..... 9

APPENDIX..... 18

TABLE OF AUTHORITIES

Beacon Theatres, Inc. v. Westover,
79 S.Ct. 948, 956.....13, 14

Chambers v. NASCO,
111 S.Ct. 2123, 2135 n.14.....11, 12

Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.,
113 S.Ct. 2264, 2277..... 17

Heck v. Humphrey,
[Justice Sourter's Concurring Opinion]
114 S.Ct. 2364, 2380.....15, 16

National Hockey League v. Metro. Hockey Club, Inc.,
96 S.Ct. 2778, 2780..... 12

Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,
78 S.Ct. 1087..... 11

Zaldivar v. Los Angeles,
780 F.2d 823, 830..... 12

OPINIONS DELIVERED IN THE CASE

U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA---BILLINGS DIVISION:

1) Memorandum and Order, July 1,1993
2) Memorandum and Order, Aug. 25, 1993
3) Order, Nov. 2, 1993
4) Memorandum and Order, Dec. 16, 1993
5) Memorandum and Order, Feb. 11, 1994
6) Order for Extension of Time, May 19, 1994
7) Order, July 5, 1994
8) Memorandum and Order, Sept. 26, 1994
9) Memorandum and Order, May 5, 1995

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

1) Memorandum, Jan. 26, 1996
2) Order, April 2, 1996
3) Judgment, April 10, 1996

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit by Memorandum decision affirmed the lower court's decision on Jan. 26, 1996. The petition for rehearing was denied on April 2, 1996. The Mandate was filed on April 10, 1996, and was issued on April 15, 1996. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C.§1254(1) to review the judgment or decree in question by writ of certiorari.

RELEVANT STATUTES

Title 28 U.S.C. Federal Rule of
Civil Procedure 30(b)(1)
and (g)(1)..... supra
[Appendix(text)]..... 56, 57

Title 28 U.S.C. Federal Rule of
Civil Procedure 33(b). 5, 7, 8, 13, 14
[Appendix(text)]..... 58, 59

Title 28 U.S.C. Federal Rule of
Civil Procedure 37..... supra
[Appendix(text)]..... 60-71

All citations effective Dec. 1, 1993

STATEMENT OF THE CASE

Petitioners Karl and Hope Wudtke, hereafter referred to as the Wudtkes, allege that Respondents Kelly Childers, Nickolas Murnion, and School District #19 of Garfield County of Montana, hereafter referred to as Childers, intentionally and maliciously deprived the Wudtkes of First Amendment rights, liberty, and property without due process of law, while acting under color of state law and in conspiracy, thereby causing the Wudtkes injury. Seeking redress, the Wudtkes filed this action pro se in the United States District Court for Montana---Billings Division, pursuant to 42 U.S.C.§1983, jurisdiction being conferred by 28 U.S.C.§1343. Diversity jurisdiction pursuant to 28 U.S.C. §1332 is also claimed for the Montana statutory and common law claims.

All district court rulings were biased against the Wudtkes. Those material to the questions presented for review are: 1] The district court approved and fostered Childers' bad faith total evasion of discovery: Childers willfully provided absolutely no discovery to the Wudtkes during the entire 24 months at the district court. Paramount was Childers' 17 month purposeful failure to answer three sets of Federal Rules of Civil Procedure 33, 34, and 36 written discovery requests from the Wudtkes. Upon proper Wudtke motion to compel those answers, the district court simply ignored the motion. 2] The district court fostered and condoned Childers' abusive bad faith duplicative discovery of the Wudtkes: Foremost, after notifying the Wudtkes to appear in a Montana Courtroom for oral depositions, Childers then closed and locked the only apparent Courtroom door; and provided no

notice or evidence of their own presence. At the designated time and thereafter, the Wudtkes unsuccessfully tried to enter, and justifiably inferred that Childers had been delayed. During that time, Childers was aware of the Wudtke appearance at the locked doorway, but willfully refused to take advantage of that availability to depose them. After three unsuccessful hours of waiting and trying to find a possible alternate Childers location, the Wudtkes returned to their home in Wisconsin. After the Wudtkes left, Childers unlocked and opened the door, and proceeded to depose party and nonparty witnesses without notice to the Wudtkes.

Childers next moved to dismiss the action, asserting entitlement because the Wudtkes had not physically entered and visually appeared <u>within</u> the designated place. The Wudtkes moved the district court for a

default judgment pursuant to Federal Rule of Civil Procedure 37(d), asserting entitlement because Childers had in bad faith: a) totally evaded discovery[Ante, 5]; b) not appeared to take the Wudtke oral depositions upon awareness of Wudtke availability; and c) conducted unnoticed oral depositions.

By Federal Rule of Civil Procedure 37(d) order addressing all motions, the district court determined that the Wudtkes had not appeared as noticed for the oral depositions, nor had they made a good faith effort to appear. Its remedy was: a) to order the Wudtkes to pay Childers $500 in expenses; b) to order the Wudtkes to travel again to Montana for oral depositions; and c) to stay all Wudtke discovery until (a) and (b) had been complied with. The order did not discuss: a) Wudtke availability; b) Childers' notice; or

c) the Wudtke motion to compel written discovery responses[Ante, 5].

The Wudtkes alleged district court bias and moved pursuant to 28 U.S.C.§455(a) for judicial recusal and reconsideration. The court refused to recuse; refused to reconsider; and dismissed the action pursuant to Federal Rule of Civil Procedure 41(b).

The Wudtkes appealed to the United States Court of Appeals for the Ninth Circuit, alleging material bias of the district court by clearly erroneous findings of fact, and extensive misapplications of law at both the pleading and discovery stages of the action.

Without discussion, the appellate court affirmed, and denied the subsequent petition for rehearing.

ARGUMENT

Question #1: Whether the known "availability" of petitioners for oral depositions, entry having been precluded by respondents, suffices as "appearance"? This is an important question of federal law, specifically of word definition in Federal Rules of Civil Procedure 30 and 37, which has not been, but should be, settled by this Court. Potentially, its lack of determination could affect discovery in every federal civil action.

Relevant undisputed facts for this argument show that the oral depositions would have proceeded---with no sanctions imposed ---if Childers had simply chosen to do so, as the Wudtkes were known to be "available" to them for that purpose at the designated time. Childers, however, chose not to proceed, and the district court

responded by imposing sanctions on the Wudtkes, affirmed by the Court of Appeals.

The penalizing of one person for the conduct of another is without support of law; is arbitrary; and violates due process. In Rules 30 and 37, the term "appear" directs witness conducts without similar directive to the party giving the notice to take advantage of known witness availability; thereby allowing for schemes to defeat witness visual appearance, such as in the instant case by closing and locking the door. Because potential schemes such as this to prevent visual appearance are virtually limitless, due process will not be served absent this Court's direction that witness "availability" for oral depositions is "appearing", for purposes of these Rules.

Question #2: Whether the Federal Rule of Civil Procedure 41(b) dismissal of the action for petitioners' failure to comply with a single biased discovery order was improper, conflicting directly with this Court's opinion in Chambers v. NASCO, 111 S.Ct. 2123, 2135 n. 14?

This action was dismissed for the failure of the Wudtkes to comply with a single discovery order, pursuant to Federal Rule of Civil Procedure 41(b). That judgment, however, affirmed by the appellate court, has been held by this Court repeatedly to be improper. In Chambers v. NASCO, 111 S.Ct. 2123, 2135 n.14, this Court cited Societe Internationale v. Rogers, 78 S.Ct. 1087, 1093, to illustrate and affirm its previous holding that Rule 41(b) pertains only to trials---not to discovery; and to reiterate its holding that discovery sanctions, including dismissal, must be made pursuant to Rule 37(d).

This Court further goes on in Chambers, 2135 n.14, to cite Zaldivar v. Los Angeles, 780 F.2d 823, 830, thereby affirming that holding that the use of a wrong sanctioning rule is often in error because of different circumstances.

That different circumstance applies here. Whereas Rule 41(b) may be used to dismiss at trial for failure to comply with but a single order of the court, this Court has held in National Hockey League v. Metro. Hockey Club., Inc., 96 S.Ct. 2778, 2780, that the district court must consider the full record in determining whether or not to dismiss for failure to comply with discovery orders. Clearly, the district court states, and the record bears out, that only a single order was considered. With that, this action may not be dismissed pursuant to either Rule 41(b) or 37(d), and the judgment must be vacated.

Question #3: Whether petitioners were deprived of their right to a trial by jury by material bias of the district and appellate courts, in abject contravention of this Court's holding in Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 956?

The dismissal of this action flowed entirely from the district court's Federal Rule of Civil Procedure 37(d) discovery order, filed Sept. 26, 1994.

A proper review of that order and the full record shows that the district court repeatedly and materially abused its discretion by: a) failing to consider respondents' total evasion of discovery; b) failing to consider respondents' failure to appear to take the Wudtke oral depositions upon awareness of Wudtke availability; c) failing to consider respondents' conducting of oral depositions without notice to the Wudtkes; d) staying

of all Wudtke discovery without cause; e) imposing financial sanctions upon the Wudtkes without just cause; f) ordering duplicative discovery of the Wudtkes without just cause; g) ignoring the Wudtke motion to compel written discovery responses; h) ignoring Wudtke total compliance with all nonduplicative respondent discovery requests; and i) totally misrepresenting the facts of the discovery history of the case.

The record itself clearly shows the Wudtkes to be discovery compliant; but Childers to be totally discovery evasive and abusive, and with whom the district court concerted by abusing its discretion in flagrant attempt to procedurally defeat the Wudtke action without trial by jury, in total distain for this Court's directives in Beacon Theatres, Inc. v. Westover, 79 S.Ct. 948, 956.

The Question Generally: By concurring opinion in Heck v. Humphrey, 114 S.Ct. 2364, 2380; Mr. Justice Souter conceptualized the efficacy of a political conspiracy effecting unconstitutional deprivations by state level machinations with participating judiciary. Here, the Wudtkes allege Justice Souter's scenario, differing only in federal participation and simple greed motive.

In both the instant and Wudtke companion case in the United States District Court for the Eastern District of Wisconsin, Case No. 89-C-1575, currently on appeal to the United States Court of Appeals for the Seventh Circuit, Case No. 94-2864; the Wudtkes allege ownership of extremely lucrative private research, and a business interest involving interstate commerce, the Wyoming corporation High Plains Agricultural Investments, specifically

created to implement that Wudtke research by business partners politically powerful in both federal and state arenas.

Since 1987, however, the Justice Souter scenario has effectively deprived the Wudtkes of those properties without due process of law. The judiciaries called upon by the Wudtkes for redress, including the lower courts in both the instant and Wudtke companion cases, have repeatedly abused their discretion in obvious concert to procedurally defeat the Wudtke actions without trial by jury. In the Wudtke companion case in Wisconsin, a federal judge has already recused himself for appearance of bias against the Wudtkes. With the district court conducts of the instant case, the inference of the federal judiciary participating in the conspiracy as alleged is obvious.

In Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., 113 S.Ct. 2264, 2277; this Court affirmed a judicial requirement of "appearance of justice" to satisfy "Justice" itself. In the Wudtke actions, that appearance is nonexistent. Accordingly, in its inherent role as the ultimate check on government abuse, it is imperative that this Court, sua sponte: a) enjoin all federal, state, and local governmental entities from present and future unlawful conducts against the Wudtkes; b) mandate the United States Department of Justice to investigate all Wudtke allegations of past governmental unlawful conducts, which said Department has to date refused to do upon repeated Wudtke complaints; and c) grant this petition to review lower court conducts in both this case and the Wudtke companion case in Wisconsin.

APPENDIX

Memorandum; United States Court of Appeals for the Ninth Circuit.....19

Memorandum and Order; United States District Court for the District of Montana---Billings Division.....21

Memorandum and Order; United States District Court for Montana---Billings Division.....33

Order; United States Court of Appeals for the Ninth Circuit.....55

28 U.S.C. Federal Rule of Civil Procedure 30(b)(1) and(g)(1).....56

28 U.S.C. Federal Rule of Civil Procedure 33(b).....58

28 U.S.C. Federal Rule of Civil Procedure 37.....60

United States Court of Appeals for the Ninth Circuit: Wudtke v. Childers;
Case No. 95-35564 Submitted 1/23/96**
D.C. Case No. CV-93-00062 JFB
Memorandum*: Jan. 26, 1996
Hope and Karl Wudtke appeal pro se the district court's dismissal of their 42 U.S.C.§1983 action. They contend the district court erred when it dismissed their action with prejudice pursuant to Fed. R. Civ. P. 41(b). We have jurisdiction pursuant to 28 U.S.C.§1291. We review for abuse of discretion, Ferdik v. Bonzelet, 963 F.2d 1258, 1260(9th Cir.), cert. denied, 113 S.Ct. 321 (1992), and affirm.

The Wudtkes contend the district court erred when it: denied their motion for default judgment pursuant to Rule 37, for judgment on the pleadings, and to disqualify the district court judge; and dis-

missed their action with prejudice for refusing to comply with discovery orders. We disagree for the reasons stated by the district court.[1/]

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

1/ If we had jurisdiction to consider the Wudtkes' motions to disbar Defendants' counsel and for impeachment proceedings against the district court judge, we would deny their motion as frivolous.

United States District Court for the District of Montana: Wudtke v. Childers; Case No. CV-93-62-BLG-JFB

Memorandum and Order: May 5, 1995

Pending before the Court are (1) Plaintiffs' Motion to Disqualify Hon. James F. Battin; (2) Plaintiffs' Motion for Reconsideration; and (3) Defendants' Motion to Dismiss. For the reasons stated below, the motions are granted and denied as follows.

FACTS AND PROCEDURAL BACKGROUND

The facts and procedural background of this case are adequately reviewed in this Court's September 26, 1994, Memorandum and Order, and will not be restated in detail here. In that Order, the Court stayed all further proceedings in this matter, including discovery, until such time as Plaintiffs complied with the terms of the Order, which included: (1) reimbursing Defendants $500.00 for attorney's fees

incurred in attempting to take Plaintiffs' depositions, for which Plaintiffs did not appear, and (2) on or before April 3, 1995, making themselves available for a rescheduled deposition in Billings, Montana. Plaintiffs were specifically advised that "failure to pay or to so appear within the time period established by this Order shall result in dismissal of this action, with prejudice, pursuant to Rule 41(b), Fed. R. Civ. P." Mem. & Ord. of Sept. 26, 1994, pg. 12(emphasis in original).

On March 20, 1995, Plaintiffs filed a Motion for Judicial Disqualification for Bias, pursuant to 28 U.S.C.§455, and a Motion for Reconsideration of the Court's September 26, 1994 Order. According to Plaintiffs, [t]hrough a series of completely arbitrary and capricious rulings unmistakable biased against the plaintiffs, culminating in the Court's Memorandum and

order dated 26 September, 1994, this Court has clearly engaged in conduct beyond its discretion for the purpose of denying the plaintiffs discovery and their resultant opportunities for redress, in obvious defiance of the due process clause of the Fourteenth Amendment to the U.S. Constitution." Plaintiffs argue that the bias and appearance of impropriety evidenced by these rulings requires immediate judicial recusal. After recusal, Plaintiffs state that "[t] new Court must then Reconsider and Reverse the 26 Sept. 1994 Order, and find a purposefully deceitful abuse and evasion of discovery by defense counsel, warranting a default judgment for sum demanded in favor of the plaintiffs."

Defendants oppose both of Plaintiffs' motions, and assert their own motion to dismiss based upon Plaintiffs' noncompliance with the Court's September 26,

1994, Order. The Court has carefully considered the merits of each of the motions and rules as follows.

I. Motion to Disqualify

Plaintiffs first request that the undersigned voluntarily recuse himself from presiding over any future proceedings in this matter, under 28 U.S.C.§455(a). Under that section, the standard for recusal is "whether a reasonable person with knowledge of all the facts would conclude the judge's impartiality might rea-reasonably be questioned." Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 712 (9th Cir. 1992) (citation omitted). Section 455 requires recusal only if the judge's alleged bias or prejudice "stems from an extrajudicial source and not from conduct or rulings made during the course of the proceedings. Pau v. Yosemite Park & Curry Co., 928 F.2d 88, 885 (9th Cir. 1991); Toth v. Trans World Airlines, Inc.,

862 F.2d 1381, 1388 (9th Cir. 1988).

In this case, the Court's bias is allegedly reflected in its actions and rulings while presiding over this case. However, Plaintiffs have not connected the alleged bias to any extrajudicial source. Nor have Plaintiffs shown that the rulings in question reflect the requisite degree of antagonism or favoritism, to create the "rarest of circumstances" in which judicial ruling may support a motion for recusal. See United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994) (quoting Liteky v. United States, 114 S.Ct. 1147, 1157 (1994). As such, the motion for disqualification is properly denied.

II. Motion for Reconsideration

Next, Plaintiffs seek reconsideration of the Court's Order of September 26, 1994.[1] "In order to justify reconsideration of an order, a party must show that there has

been some intervening development in the law, some new evidence not previously available, or that the prior order is in clear error or would operate to create a manifest injustice." Leong v. Hilton Hotels Corp., 689 F.Supp. 1572, 1573 (D. Haw. 1990); accord Boone v. United States, 743 S.Supp. 1367 (D. Haw. 1990); Kern-Tulare Water District v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986). A motion for reconsideration which presents no new arguments should be denied. Backlund v. Barnhart 778 F.2d 1386 (9th Cir. 1985). In the present motion for reconsideration, Plaintiffs essentially reargue the merits of their earlier motions under Rules 30(g)(1) and 37(d), Fed.R.Civ. P.. The Court finds no reason to reconsider its ruling at this time. Plaintiffs' motion for reconsideration is therefore denied.

III. Motion to Dismiss

Defendants seek dismissal of this action under Rule 41(b), Fed.R.Civ.P., based upon Plaintiffs' failure to comply with the requirements of the Court's September 26, 1994, Order. "A dismissal with prejudice [under Rule 41(b)] is a harsh sanction that should not be invoked lightly in view of the sound public policy of deciding cases on their merits." Herbert v. Saffell, 877 F.2d 267, 269-70 (4th Cir. 1989) (citations and internal quotations omitted). An order of dismissal as a sanction under Rule 41(b) is reviewable only for abuse of discretion. Coleman v. American Red Cross, 23 F.3d 1091, 1095 (9th Cir. 1994).

In considering a motion for dismissal under Rule 41(b) for failure to comply with a court order, the Court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket;

(3) the risk of prejudice to defendants; (4) the availability of less drastic sanctions; and (5) the public policy favoring disposition of cases on their merits. Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). Other courts also consider the degree of personal responsibility of the Plaintiff, as opposed to the responsibility of counsel, for the noncompliance. Herbert, 877 F.2d at 270 (citations omitted).

In this case, Plaintiffs' noncompliance with the Court's September 26, 1996, Order is the result of Plaintiffs' own disagreement with the merits of the Court's ruling, and their apparent belief that they are entitled to substitute their own judgment for that of the Court. As such, this is not a case where dismissal would unfairly penalize Plaintiffs because of the imputed conduct of another, such as an attorney;

Plaintiffs themselves are culpable. Compare Colman, 23 F.3d at 1095 (refusing to impute the wrongful conduct of counsel to the Plaintiffs, for purposes of dismissal under Rule 41(b).

The Court's ability to manage its docket is hampered by Plaintiffs' refusal to abide by the time limitations set by the Court. The case cannot reasonably be expected to proceed to a full resolution on the merits unless and until these critical depositions are taken. By refusing to participate in their own depositions, except under the terms and conditions dictated by them, Plaintiffs thwart their own interest, and that of the public, in expeditious resolution of the litigation.

Defendants, too, are prejudiced by the Plaintiffs' noncompliance, because once again they have been deprived of the oppor-

tunity to conduct these important depositions. Plaintiffs are two of the primary actors in the situation and are uniquely able to articulate the claims asserted and their view of the factual bases for them. By continually delaying the taking of their depositions, Plaintiffs necessarily prevent Defendants from moving forward in the preparation of their defense.

The Court previously rejected dismissal of the action as a sanction for Plaintiffs' failure to fully cooperate in the taking of their depositions, and instead fashioned what it believed to be a fair and reasonable solution to the discovery problem. Despite the clear warning that dismissal would be the consequence of noncompliance with its September 26, Order, Plaintiffs continue to challenge the authority of the Court to determine such matters. Significantly, in their response

to the Motion to Dismiss, Plaintiffs do not contend that they are unable to pay the attorney's fees assessed, nor do they argue that it is impossible for them to travel to Montana for the depositions as ordered. Instead, their sole opposition to the Motion to Dismiss is based upon their disagreement about the propriety of the Court's Order. The Court does not believe that anything short of complete acquiescence to Plaintiff's view of the case (both on the merits and in terms of scheduling) will satisfy them, and does not believe that any lesser sanction will persuade Plaintiffs to respect and abide by the rulings of this Court. Therefore, as a sanction for Plaintiff's intentional noncompliance with its Order, the Court finds that dismissal of the action is appropriate, under Rule 41(b), Fed.R.Civ.P.

Based on the foregoing,

IT IS ORDERED that Plaintiffs' motions for disqualification and for reconsideration are denied. Defendant's motion to dismiss the action under Rule 41(b), Fed. R.Civ.P., as a sanction for Plaintiffs' noncompliance with the Court's order of September 26, 1995, is granted, and this case is hereby dismissed, with prejudice.

The Clerk is directed to enter Judgment in accordance with this Order.

The Clerk is directed to forthwith notify Plaintiffs and counsel of record of the making of this Order.

Done and dated this 5th day of May, 1995

(James F. Battin)

Senior U.S. District Judge

1 Plaintiffs obviously intended that their motion for reconsideration be heard by a different judge. However, that will not occur, in light of the Court's denial of the motion for disqualification.

United States District Court for the District of Montana: Wudtke v. Childers

Case No. CV-93-62-BLG-JFB

Memorandum and Order: Sept. 26, 1996

Pending before the Court are (1) Plaintiffs' Motion for a Rule 30(g)(1) Award of Reasonable Expenses; (2) Defendants' Motion for an Order Dismissing Action on Failure of Parties to Appear at Depositions and for an award of reasonable expenses, including attorney's fees, incurred as a result of the nonappearance; and (3) Plaintiffs' Rule 37(d) Motion for Default Judgment or, In the Alternative, for Leave to File Rule 15(d) Supplemental Pleading. For the reasons stated below, Plaintiffs' motions are denied and Defendants' motion is granted in part and denied in part.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs filed this action on April 26, 1993, asserting claims for alleged civil rights violations under 42 U.S.C.§1983, as

well as pendant claims under Montana law, arising out of Plaintiff Hope Wudtke's commencement and termination from employment as a teacher with the Defendant school district. On July 1, 1993, the Court dismissed the civil rights claims, finding that there was no deprivation of a protected property interest without due process of law, and further declined to exercise jurisdiction over the state claims. See Mem. and Ord. of July 1, 1993. On August 25, 1993, pursuant to a motion by the Plaintiffs, the Court dismissed Karl Wudtke as a party plaintiff and granted Plaintiffs leave to file an Amended Complaint alleging diversity of citizenship as a basis for federal jurisdiction. See Mem. and Ord. of August 5, 1993. The Amended Complaint filed by Plaintiffs contained new factual allegations not previously presented to the Court, and called into question the cor-

rectness of the Court's prior ruling dismissing the §1983 claims. In an act of lenience towards Plaintiffs, the Court reconsidered its prior ruling and reinstated the federal claims. See Mem. and Ord. of February 11, 1994. A trial date was set, and since that time the parties have been attempting to conduct discovery.

These Plaintiffs are experienced pro se litigators, having prosecuted at least one other action in federal Court in addition to the present one. However, their resources are limited and no matter how skilled they may perceive themselves to be, they obviously lack a full understanding of some of the finer points of law and procedure. This lack of understanding has led them to file several unsuccessful motions, substantially adding to the time and expense incurred by the Court and opposing counsel in this matter. Again,

in deference to their pro se status, the Court has refrained from any interference in the litigation process.

However, in addition to their understandable lack of legal acumen, it has become evident to the Court that these Plaintiffs also hold certain false perceptions concerning how the judicial process works, and have attempted to use their pro se status to manipulate these proceedings. This conduct is less understandable, and certainly less tolerable. Plaintiffs appear to believe that they are entitled to dictate the scheduling of the case. They objected to the timing of conferences, motions and oral argument and resisted appearing for their own depositions, complaining that their teaching schedules, financial ability, vacation plans, child-care arrangements, and other personal factors made it impossible to participate.

However, their complaints of impossibility or inconvenience seem to be matters of choice rather than true necessity since they somehow manage to overcome those same obstacles when their own interests require doing so or when the Court finally orders them to do so. See Mem. and Order of December 16, 1993 (noting that Plaintiffs were able to travel from Texas to Wisconsin to spend the 1993 Christmas holidays, and thus their claim that they lacked time or money to come to Montana for depositions lacked credibility). Their unwillingness to be inconvenienced in the prosecution of their claims has disrupted the orderly progress of this litigation.

The present motions arise out of difficulties encountered by the parties in the scheduling and taking of depositions. Initially, Plaintiffs scheduled the depo-

sitions of some seventeen parties and witnesses on July 20-21, 1994, at the Custer County Courthouse in Miles City, Montana. Thereafter, Defendants sought a protective order with respect to the seventeen depositions, and noticed the Plaintiffs' depositions for August 4-5, 1994. On July 12, 1994, at the request of Defendants, the Court conducted a telephonic discovery conference. During that conference, Plaintiffs advised the Court that they had received written discovery responses from Defendants and determined that the seventeen depositions were not needed. Plaintiffs further advised the Court that it was not possible for them to appear on August 4-5 for their depositions, due to time, financial, and child care problems. When asked whether they could appear in Montana for the taking of their depositions on July 20-21, at the time they had previously intended to come to Montana for

their own seventeen depositions, Plaintiffs advised the Court that although Plaintiff Karl Wudtke could attend, Hope Wudtke absolutely could not, again due to financial, time and child care problems. The Court, again indulging Plaintiffs' claimed financial difficulties and pro se status, did not compel Plaintiffs to attend on August 4-5 or on July 20-21, but simply advised them that at some point in time they would have to make themselves available in Billings for depositions.

Thereafter, Plaintiffs apparently changed their minds and overcame the previous obstacles, agreeing to appear in the Courtroom at the Custer County Courthouse at Miles City, Montana, at 10:00 a.m. on July 20-21, 1994, for the taking of both their depositions. It appears that both Plaintiffs and Defendants were present in the Courthouse at the designated time and

date, yet did not manage to connect for the depositions. Defense counsel and his legal intern, along with a court reporter and Defendants Nickolas Murnion and Kelly Childers, were situated in the Courtroom waiting for the Plaintiffs' appearance. According to Defendants, the lights were on and one of the two entrances to the Courtroom was unlocked and standing open as they awaited Plaintiffs' arrival. See Aff. of David Legare dated August 19, 1994, pg 2, ¶4.

Meanwhile, Plaintiffs were seated on a bench directly outside the Courtroom, across the hall from the Clerk of Court's office and next to the other of the two entrances to the Courtroom. They contend that no light was on in the Courtroom to indicate that it was occupied; and that when they tried to open the door, it was locked. Plaintiffs state that

> at 10:18 a.m., July 20, 1994, Karl and Hope concluded that defense counsel Walen had not in good faith ever planned on taking the Wudtkes' oral depositions at that time and place and had only intended to deprive us of four(4) of the few days which we had to research and write our primary brief for the Seventh Circuit Court of Appeals, and that they were as such acting in concert with the defendants of our other civil action in Wisconsin which we have previously alleged.

Affs. of Hope C. Wudtke and Karl F. Wudtke in Support of Motion for Default Judgment, pg. 10-11, ¶30. Based upon these suspicions of a conspiracy to deprive them of their rights, Wudtkes determined "to look over the entire Courthouse in [sic] attempt to find them if they were in actuality there." Id.

Interestingly, this diligent search of the "entire Courthouse" did not encompass simply walking several feet across the hall to the Clerk of Court's office to inquire about the depositions, or to inquire about other means of access to the Courtroom. Had they done so, it is virtually certain that they would have been directed to the proper place. Nor do Plaintiffs contend that they affirmatively inquired of anyone else whether they had knowledge of any depositions taking place that day. Instead, Plaintiffs appear to have merely wandered through the Courthouse for a short time, peeking into doors at random looking for someone they recognized before giving up and leaving Miles City.

Plaintiffs portray the situation as one in which they are the innocent victims of a conspiracy to thwart their litigation efforts by keeping them in the dark about

these depositions. The simple fact is that while Plaintiffs blame the Defendants for failing to come out in the hall and advise them of the exact location of the deposition, and blame the Clerks of Court who walked by them as they were sitting on the bench for not volunteering information concerning the location of the depositions, there were other courses of action Plaintiffs could reasonably have taken to eliminate the confusion, but did not. For example, Plaintiffs chastise defense counsel for not calling and leaving a message at their residence in Wisconsin to clarify the location of the depositions, yet Plaintiffs could just as easily have called defense counsel's office in Billings to verify the time and location of the depositions. Had they done so, they would have been informed that defense counsel had, indeed, traveled to Miles City for the depositions. Even a simple knock on

the Courtroom door would have been more likely to elicit a response than simply trying to turn the locked knob and later blaming Defendants for failing to hear and/or respond to the rattling of the door knob. Rather than taking this or other relatively easy and logical steps to try to determine the precise location of the depositions, Plaintiffs simply gave up and left Miles City.

Moreover, numerous factual discrepancies support the conclusion that Plaintiffs' version of the events is less than accurate. For example, Plaintiffs contend that the doors to the Courtroom were covered with smoked glass and that the Courtroom appeared to be dark and unoccupied. However, the Affidavit of Darcy Boggs, the staff Court Reporter for the Sixteenth Judicial District of Montana, establishes otherwise. Specifically, Ms. Boggs states

that

> [a]t approximately 10:00 a.m. on the morning of July 20, 1994, I was walking down the hall on the third floor of the Courthouse and noticed that the lights were on in the Courtroom. I looked through the door to the front of the Courtroom and saw a number of people who later I found out from the Clerk of Court they were waiting to take the depositions of a plaintiff in a case that they had.

Aff. of Darcy Boggs, pg. 2, ¶5. Thus, Plaintiffs' contention that the lights were off in the Courtroom and that after searching the "entire Courthouse" they were unable to locate the Defendants and their counsel is unbelievable.

Likewise, Plaintiffs acknowledge that they checked out of their hotel room, obviously prepared to leave town, no later than

10:53 a.m., as reflected on the payment receipt submitted by Plaintiffs along with their motion. Plaintiffs contend they were forced to make a hasty decision about whether to stay or go, because checkout time was 11:00 a.m. and they feared being needlessly charged for a second night's accomodations. However, David Legare, a legal intern for defense counsel, inquired of the manager of the Custer Inn and was told that the Plaintiffs were specifically informed they could remain in the room as late as 1:00 or 2:00 without incurring any late charges. Affidavit of David Legare dated August 1, 1994, pg. 6, ¶¶25-27.

Plaintiffs credibility in this matter is further undermined by their unsupported references to a conspiracy between these Defendants and the Defendants in another civil case presently being pursued by them in the United States District Court for the

Eastern District of Wisconsin, Cause No. 89-C-1575. See Plaintiffs' Preliminary Pretrial Statement, pg. 5, ¶9. Plaintiffs now believe that Defense counsel deliberately set them up for a no-show at the depositions in order to set the stage for dismissal of the action, and that this "flagrant pattern of discovery abuse: is evidence of participation in the "conspiracy to thwart their litigation efforts." See Pltfs' Rule 37(d) Mot. for Def. J., pg. 2. The Court believes that Plaintiffs' unfounded perception of an ever-widening conspiracy by these defendants, defense counsel and others adversely affects the reasonableness of their actions in conducting the litigation.

After evaluating the relative conduct of the parties leading to the botched depositions, the Court finds that the Plaintiffs were most culpable. Defendants were pres-

ent and ready to proceed with the depositions at the designated time and place. They reasonably situated themselves in the front part of the Courtroom, where there were presumably counsel tables and chairs, rather than in the rear of the Courtroom where the Courtroom audience sits. When the Plaintiffs were spotted sitting outside the Courtroom just before 10:00 a.m., Defendants reasonably assumed that they knew the location of the depositions and left them alone to confer prior to the depositions.

Plaintiffs, on the other hand, did not appear at the time and place designated for their depositions, and did not exercise reasonable diligence in attempting to do so. They failed to make even the slightest inquiry of the Clerk of Court, the resident Court Reporter, or other Courthouse occupants regarding the Defend-

ants' presence in the Courthouse or alternate means of access to the Courtroom, and failed to take other reasonable measures to locate defense counsel prior to leaving Miles City. The Court therefore concludes that Plaintiffs have failed to attend at their own depositions, within the meaning of Rule 37(d), and that Defendants' request for relief under that rule is properly granted.

Defendants ask that the Court dismiss Plaintiffs' Third Amended Complaint, as a sanction for their failure to appear at their own depositions. Dismissal is within the scope of the Court's discretion when there has been "flagrant, bad faith disregard of discovery duties." Wanderer v. Johnston, 910 F.2d 652, 655-56(9th Cir. 1990) (citation omitted). However, because it is an extreme and harsh penalty, dismissal is appropriate only after consider-

ation of five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to ...[the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Id. at 656 (quoting Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987). After consideration of these factors, the Court concludes that the fourth and fifth factors militate against dismissal at this time. Specifically, the Court finds it appropriate to allow Plaintiffs an opportunity to remedy their previous failure to attend by giving them another opportunity to appear for the taking of their depositions, thereby permitting this case to proceed to a determination of the merits.

To that end, the Court will fashion a remedy, within the scope of those actions authorized by Rule 37(d), intended to provide a measure of accountability for Plaintiffs' lack of diligence, and to further ensure that the same sort of conduct will not occur in the future. As part of this remedy, all further proceedings in this matter, including disovery, shall be stayed until such time as Plaintiffs have complied with the terms of this Order. A stay of proceedings is warranted, due to the importance of the Plaintiffs' depositions in the further development of the case and the patent unfairness of allowing Plaintiffs to proceed with the prosecution of their claims when Defendants have been precluded (by Plaintiffs' own actions) from conducting these critical depositions.

Finally, Defendants' request for an award of reasonable expenses, including attor-

ney's fees, is granted in an amount not to exceed $500.00. Plaintiffs' claimed ignorance of the site of the depositions did not substantially justify their failure to appear, given their complete failure to make even the slightest inquiry of persons who could have easily directed them to defendants and defense counsel, who were awaiting their arrival.

Accordingly,

IT IS ORDERED that:

(1) Plaintiffs' Motion for a Rule 30(g)(1) Award of Reasonable expenses is denied;

(2) Defendants' Motion for an Order Dismissing Action on Failure of Parties to Appear at Depositions is denied. Defendants' request for an award of reasonable expenses, including attorney's fees, incurred as a result of Plaintiffs' non-appearance is granted in the amount of $500.00, to be paid in full no later than April 3, 1995.

(3) Plaintiffs' Rule 37(d) Motion for Default Judgment or, In the Alternative, for Leave to File Rule 15(d) Supplemental Pleading, is denied.

IT IS FURTHER ORDERED that Plaintiffs Hope C. Wudtke and Karl F. Wudtke shall make themselves available, at their own expense, for the taking of their depositions at the offices of defense counsel in Billings, Montana, no later than April 3, 1995. Plaintiffs shall be prepared to spend at least two full days in Billings for the depositions, and defense counsel shall be notified at least thirty (30) days in advance of the dates on which Plaintiffs choose to appear.

IT IS FURTHER ORDERED that the trial date and associated pretrial deadlines entered on May 12, 1994, are vacated, and all further proceedings in this case, including

discovery, are stayed until such time as the expenses and attorney's fees awarded above have been paid in full, and Plaintiffs have appeared in Billings, Montana for the taking of their depositions and the depositions have, in fact, successfully been completed, in accordance with Order. Failure to pay or to so appear within the time period established by this Order shall result in dismissal of this action, with prejudice, pursuant to Rule 41(b), Fed. R. Civ. P..

The Clerk is directed to forthwith notify Plaintiffs and counsel of record of the making of this Order.

Done and dated this 26th day of September, 1994.

(James F. Battin)

Senior U.S. District Judge

United States Court of Appeals for the Ninth Circuit: Wudtke v. Childers;

Case No. 95-35564 Filed Apr. 2, 1996

D.C. Case No. CV-93-00062 JFB

Order:

The petition for rehearing is denied.

28 U.S.C. Federal Rule of Civil Procedure 30(b)(1)[Dec. 1, 1993]:

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

28 U.S.C. Federal Rule of Civil Procedure 30(g)(1)[Dec. 1, 1993]:

If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

28 U.S.C. Federal Rule of Civil Procedure 33(b)[Dec. 1, 1993]:

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories shorter or longer time may be directed by the court or, in the absence of such order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with speci-

ficity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(d) with respect to any objection to or other failure to answer an interrogatory.

28 U.S.C. Federal Rule of Civil Procedure 37[Dec. 1, 1993]:

Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discoverying party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material

without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making

the motion including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justi-

fied or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)

(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the forgoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A),(B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the forgoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be

heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless

it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection sub-

mitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make

an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed. Pub.L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to partifipate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Karl F. Wuthke,
Pro Se

Rouly of Record